

No. 10,620

In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

EDWARD SWIDERSKI,
Appellant,

vs.

ALLEN L. MOODENBAUGH,
Appellee.

PETITION FOR REHEARING

Upon Appeal from the District Court of the United
States, for the District of Oregon.

HAMPSON, KOERNER, YOUNG & SWETT,
JAMES C. DEZENDORF,
Attorneys for Appellee,
800 Pacific Building,
Portland 4, Oregon.

FILED

JUN 28 1944

PAUL P. O'BRIEN,
CLERK

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EDWARD SWIDERSKI,
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Appellee.

PETITION FOR REHEARING

Upon Appeal from the District Court of the United
States, for the District of Oregon.

TO THE HONORABLE JUDGES OF THE UNITED STATES
CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT:

Comes now Appellee and petitions the court for a
rehearing herein on the following ground:

The majority opinion, insofar as it holds that the trial
court erred in not instructing the jury upon the design-
ated speed at the place of accident, places a construc-

tion upon the Oregon Statute as amended in 1941, which is directly opposed to that adopted by the Oregon courts, as appears from the Affidavit of the Honorable James W. Crawford, Acting Presiding Judge of the Circuit Court of the State of Oregon, for the County of Multnomah, which is attached hereto and made a part hereof.

While it is true that the Oregon Supreme Court has not passed upon the question since the amendment of the Statute in 1941, the very fact that the circuit courts' construction of the Statute, as amended, has not been challenged on appeal, although literally thousands of accident cases have been tried since the Statute was amended in 1941, strengthens the circuit courts' construction of the Statute as amended.

The construction placed upon the amended Statute by the Oregon courts was called to this court's attention at the oral argument, yet it has been entirely disregarded in the majority opinion, although this court is entitled to take judicial notice of the Oregon courts' construction of the Statute as amended.¹

The Oregon courts' construction of the Statute, as amended, was a matter of general knowledge among attorneys and judges in Oregon at the time this case was tried below and was known to and followed by the trial judge in instructing the jury in this case.

¹ See *Lowman v. Billington*, 119 N. Y. Supp. 825, 65 Misc. 111; *Flannigan v. Security-First National Bank*, 41 F. Supp. 77.

This court should not disregard and overrule the construction placed upon the Oregon Statute, as amended, by the Oregon courts.

Respectfully submitted,

HAMPSON, KOERNER, YOUNG & SWETT,

JAMES C. DEZENDORF,

Attorneys for Appellee.

I, JAMES C. DEZENDORF, one of counsel for Appellee, hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

JAMES C. DEZENDORF.

No. 10620

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

EDWARD SWIDERSKI,
Appellant,

vs.

ALLEN L. MOODENBAUGH,
Appellee.

AFFIDAVIT OF JAMES W. CRAWFORD

Upon Appeal from the District Court of the United
States, for the District of Oregon.

STATE OF OREGON }
County of Multnomah }ss.

I, JAMES W. CRAWFORD, being first duly sworn, depose and say:

That I am a duly elected and acting judge of the Circuit Court of the State of Oregon for the County of Multnomah, Fourth Judicial District, Department No. 2; that there are seven departments of the Circuit Court of the State of Oregon, for the County of Multnomah,

each presided over by a Circuit Judge, and each department has tried automobile accident cases since Section 115-320, O.C.L.A., was amended by Chapter 458 of Oregon Laws, 1941; that following the amendment of the statute the judges of the departments informally discussed the question as to whether juries hearing automobile accident cases should be instructed upon designated speeds at the places where the various accidents occurred, in view of the 1941 amendment, and it was the consensus of opinion and has been the general practice since, that such instructions should not be given. It has been the general opinion that the law as laid down by the Oregon Supreme Court in the case of Zeek vs. Bicknell, 159 Ore. 167 was not changed in this respect by the 1941 amendment. The general practice in this respect in this jurisdiction has been a matter of general knowledge among attorneys and judges and to my knowledge has been followed consistently and still is the practice in the Circuit Court of the State of Oregon, County of Multnomah.

JAMES W. CRAWFORD.

Subscribed and sworn to before me this 23rd day of June, 1944.

GEO. D. GARRATT,

(SEAL)

Notary Public for Oregon.

My commission expires July 21, 1944.